



Massachusetts Law Quarterly

NOVEMBER, 1945

**KEEP THIS — READ THE DRAFT — THINK ABOUT
IT AND REACT**

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DRAFT OF RULES AND BY-LAWS FOR AN ORGANIZED BAR

Prepared by the state-wide committee of twenty-five, discussed at the Fourth Massachusetts Lawyers' Institute at Swampscott, June 8, 1945, and, in accordance with a vote at Swampscott, now submitted, through the various Bar Associations, to the entire bar for study and discussion before the Fifth Massachusetts Lawyers' Institute on June 7 and 8, 1946.

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YOU MAY WISH TO USE THIS ACT IN YOUR PRACTICE NOW

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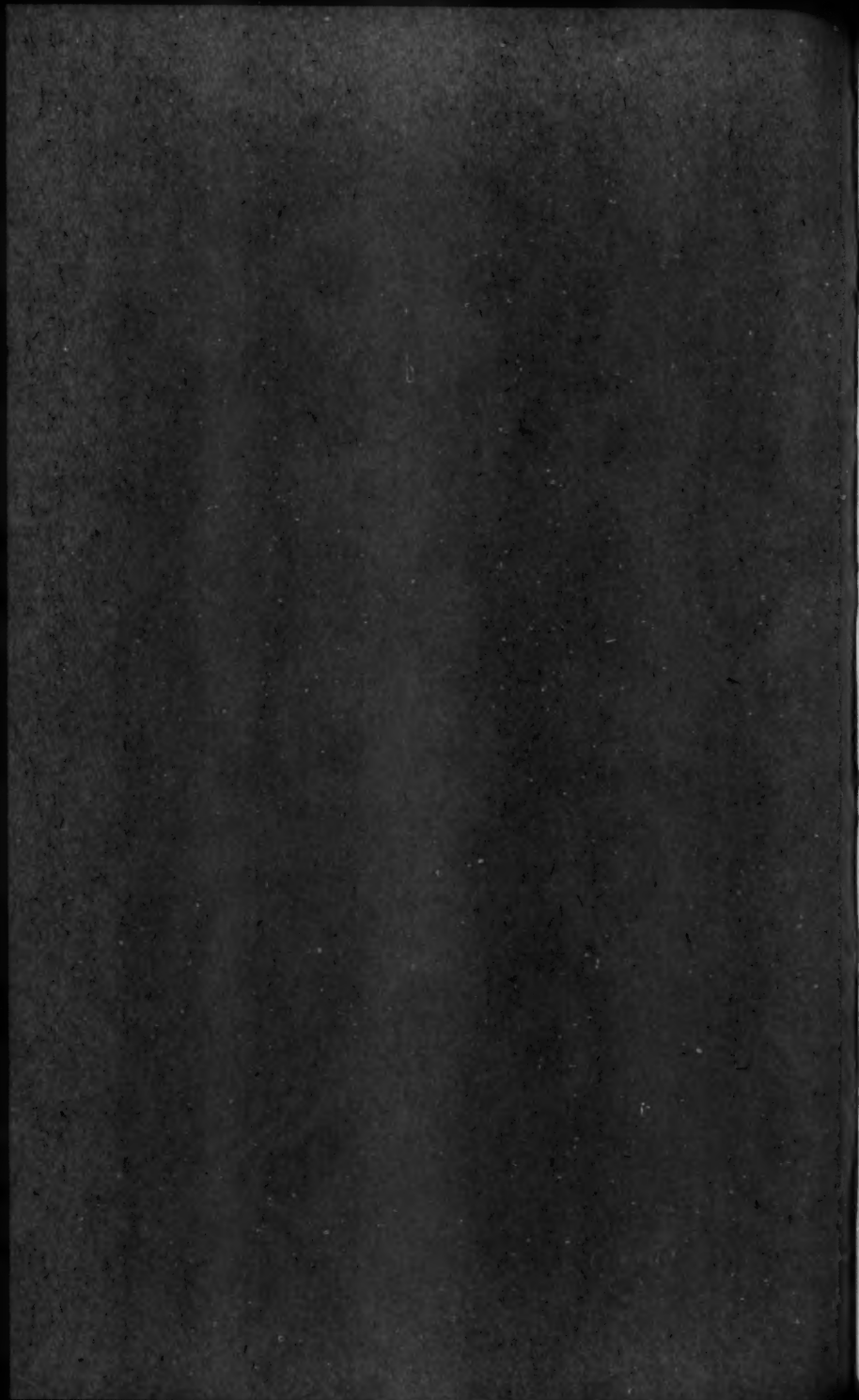
**THIS BILL MAY AFFECT THE PRACTICE OF EVERY LAWYER
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ISSUED BY THE MASSACHUSETTS BAR ASSOCIATION, 53 STATE ST., BOSTON, MASS.



Suggested Rules and By-laws for a Completely Organized Self-Governing Bar, Discussed at the Massachusetts Lawyers' Institute at Swampscott on June 8, 1945. .

At the Massachusetts Lawyers' Institute held in Swampscott in June, 1944, Mayo A. Shattuck, then retiring after three years as president of the Massachusetts Bar Association, delivered an address in which he recommended the appointment of twenty-five members of the bar from different parts of the state to study the subject of a completely organized self-governing bar in Massachusetts and to report on the subject at the Institute of 1945. The committee was appointed by the incoming president, and presented its report of progress at Swampscott on June 8, 1945, in the form of a tentative draft of rules and by-laws for discussion.

This draft was discussed at a largely attended meeting on the afternoon of June 8th, when printed copies of the draft were distributed. On the following day at the Thirty-Fourth Annual Meeting of the Massachusetts Bar Association the following vote was adopted:

"That the report of the committee of twenty-five appointed to study the subject of the complete organization of the Bar be accepted as a report of progress, that the committee be continued with all powers originally granted, that proposed rules and by-laws submitted to this meeting or as modified by the committee be sent by the secretary to all bar associations and affiliated organizations in the Commonwealth for their consideration and criticism and that the committee report back to the next annual meeting."

No other action, either for or against, was taken at the meeting.

The address of Mayo A. Shattuck referred to was printed in the *Bar Bulletin* for July, 1944, pp. 149-154 and on p. 155 the action of the Bar Association of Norfolk County in favor of complete organization was reported. This also appeared in the *Massachusetts Law Quarterly* for October, 1944.

In 1941 a postcard vote on the subject of organization was taken by a circular giving a general statement in regard to the proposal without submitting specifically formulated rules and by-laws. That vote showed about 2,000 in favor and 1,000 against such organization.

The bars of 25 states are already completely organized as a result of a movement throughout the country during the last twenty-five years. It is desirable that a widespread expression of views from the bar should be obtained before the matter is submitted to the Supreme Judicial Court, if it is to be so submitted.

In accordance with the vote at Swampscott already quoted, the draft there discussed is submitted for further discussion to all the bar associations in the Commonwealth in order that they may call it to the attention of their members and submit any comments or suggestions to the committee of twenty-five for their information before that committee reports further at the next Massachusetts Lawyers' Institute to be held in Swampscott in June, 1946.

EDWARD O. PROCTOR,

President, Massachusetts Bar Association.

**For Discussion at Massachusetts Lawyers' Institute
at Swampscott, June 8, 1945, at 2.15 P.M.**

**Report of Progress of the Committee of Twenty-Five
Appointed to Study the Subject of Complete Organization of
the Bar in Accordance with the Direction in the
Vote of 1944**

The members of the committee, both those favoring integration and those who are opposed to organization, have joined together to formulate a set of workable Rules and By-laws for Massachusetts, *as a basis for further discussion* (at the Swampscott Institute on June 8) *of the more general question whether or not there is to be organization here.*

The tentative rules which appeared in the January-March, 1940, issue of the Massachusetts Law Quarterly were taken as a basis from which the Organization Committee started its study and revision. The present draft follows in general the plan of the 1940 draft but with *some substantial revision.*

In the present draft there are some changes in the point of view with which the subject of organization has been approached. The major changes, and the ones to which attention is particularly called, are the following:

(1) No new organization or association is formed. The existing bar of Massachusetts is merely being given the mechanics for its own self-government.

(2) Instead of there being special commissioners appointed to prepare lists and to hold a first election, the present draft provides that the court itself shall appoint the members of the First Council of "The Bar of Massachusetts," thereby accomplishing the immediate organization of the bar, and then the First Council shall complete the organization and proceed with the first election.

(3) Most of the provisions of the present draft are contained in the By-laws. In the Rules there have been left only those matters which seemed to be of such a nature that they should be expressed only by the court itself.

(4) The present draft contains an extended list of the authorized committees of "The Bar of Massachusetts." This list of committees and the outline of their various duties are suggestive of the type of work which it is expected the organized bar may carry on.

The four lines relating to the Committee on Grievances (By-laws, Article 13, Section 8, page 12) do not indicate the time and thought which

have been given to this difficult subject. After considering different approaches to the matter of professional grievances, the method finally adopted in the present draft is the mere declaration that there shall be a Committee on Grievances, which shall perform its duties "in such manner as the Council may prescribe." This method means that the Committee on Grievances, either by itself, or under directions from the Council, must organize its activities and assume the various grievance responsibilities which must be handled by the organized bar. Instead of having these detailed administrative provisions in the By-laws, however, they would be covered by a vote of the Council, or possibly by a set of rules adopted by the Committee itself. This method has the advantage of not over-emphasizing the subject of grievances and also of leaving to the future the methods to be adopted when the needs therefore arise and are better known.

The members of the Committee appreciate that the proposals in the present tentative draft of Rules and By-laws may not be perfect. Attention is again called to the fact that this draft has been prepared as a basis for further discussion at the fourth Annual Massachusetts Lawyers' Institute, at Swampscott on June 8, 1945, at 2:15 P.M., and thereafter it can be distributed to bar associations and individual practitioners for further comments.

STATE-WIDE COMMITTEE ON INTEGRATION OF THE BAR

Edward O. Proctor, Chairman,
Newton

Mayo A. Shattuck, V.-Chairman,
Hingham

Richard Wait, Vice-Chairman,
Boston

Nathan P. Avery, V.-Chairman,
Holyoke

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John H. Clifford, New Bedford

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George R. Stobbs, Worcester

George L. Wainwright, Brockton

Dudley B. Wallace, Springfield

THE BAR OF MASSACHUSETTS

PROPOSED RULES AND BY-LAWS

Commonwealth of Massachusetts

At the Supreme Judicial Court holden at Boston within and for said
Commonwealth on the day of in the year of our
Lord one thousand nine hundred and forty- : present:

Hon. , Chief Justice

Hon.

Hon. Justices.

Ordered, that the following Special Rule be established; to wit:

Special Rule

For the advancement of the administration of justice according to law, and in order more effectively to aid the attorneys licensed to practice law in this Commonwealth to discharge their responsibilities as members of the legal profession and as officers of our courts, the Supreme Judicial Court, in the exercise of its authority under the Constitution, hereby provides that on and after this date all members of the bar of the Commonwealth are organized as a self-governing body of officers of the court as a part of the judicial system of the Commonwealth, subject to the constitutional authority and rules of this court, to be known as "The Bar of Massachusetts." The affairs of The Bar of Massachusetts shall be administered by a Council in conformity to the Rules for Organization which are hereby promulgated and in accordance with the provisions of the By-laws now on file with this court and with any amendments thereof adopted as therein provided.

The court hereby designates . . . (insert names of ten or fifteen lawyers representative of all areas) . . . as the members of the First Council of The Bar of Massachusetts. Said First Council is directed to complete the organization of The Bar of Massachusetts, to administer its affairs, including the collection of dues, and to cause an election to be held as provided in its By-laws, which election shall be held not later than the fifteenth day of October in the current year. The persons hereinbefore designated shall hold office as members of the First Council until the election and qualification of the members of the Council to be chosen at the election so to be held, and each shall be eligible for election as a member of the first elected Council.

Proposed Rules for Organization of The Bar of Massachusetts

Rule 1. Membership

Section 1. Those persons who on the date of the promulgation of these Rules are licensed to practice law in this Commonwealth, and those who shall hereafter become licensed to practice law in this Commonwealth, shall, subject to the provisions of these Rules, constitute the membership of The Bar of Massachusetts.

Section 2. Every person included within the foregoing section shall promptly file with the Secretary of The Bar of Massachusetts a statement setting forth the year and place of his admission to the bar, his business and residence addresses, and the county within which his principal office is located. Each member shall notify the Secretary in writing of any subsequent changes of address, and the latest address received shall be used by the Secretary.

Rule 2. Classes of Membership

Section 1. The members of The Bar of Massachusetts shall be divided into three classes, namely, active members, inactive members, and honorary members.

Section 2. The class of active members shall include all members of The Bar of Massachusetts, except those members who are honorary members, and except those members who shall become inactive members under the provisions of the next following section or under the provisions of Section 3 of Rule 4.

Section 3. Any active member who files written application with the Secretary to become an inactive member shall thereupon become an inactive member.

Section 4. Any inactive member who files written application with the Secretary to become an active member and who pays the required dues, shall thereupon become an active member.

Section 5. The judges of the courts of this Commonwealth, and the judges of the United States courts who reside in the Commonwealth, who shall not elect to be active members, shall during their respective terms of office be honorary members of The Bar of Massachusetts.

Rule 3. Practice of Law

Section 1. No individual, other than an active member of The Bar of Massachusetts, shall practice law in this Commonwealth, or shall in any

manner hold himself out as authorized, entitled, competent, qualified or able to practice law.

Section 2. Any court in this Commonwealth may, by special permission granted by it, allow any person to appear in a case pending before it.

Rule 4. Membership Dues

Section 1. No dues shall be required of inactive or of honorary members.

Section 2. The annual dues for active members shall be such sum as shall be fixed from time to time by the Council of The Bar of Massachusetts, but not to exceed ten dollars (\$10.00). Persons hereafter admitted to the bar shall not become liable for dues until one year following their admission. All dues shall be paid to the Treasurer of The Bar of Massachusetts, and shall constitute a fund for the payment of the expenses thereof.

Section 3. The Secretary shall give written notice by registered mail to every member who is in arrears for three months advising him thereof and of the provisions of this section. If the arrears in dues are not paid within thirty days after the sending of such notice, such member shall automatically and without further action be transferred from active to inactive membership, subject, however, to complete reinstatement to active membership upon payment of arrears. The Secretary shall notify such member and also the clerk of each court of any transfer or reinstatement under this section, and shall keep a record thereof.

THE BAR OF MASSACHUSETTS

Proposed By-Laws

Article 1. Membership Dues

Section 1. The annual dues for active members, as determined by the Council, shall be payable on or before August 10 of each year.

Article 2. Officers

Section 1. The officers of The Bar of Massachusetts shall be a President, a Secretary, a Treasurer, and a Council consisting of forty members, or of forty-one members in the event the President becomes an ex-officio member thereof under the provisions of Section 2 of Article 3.

Section 2. Only active members, resident in the Commonwealth, shall be eligible as officers of The Bar of Massachusetts.

Article 3. The Council

Section 1. The Council of The Bar of Massachusetts shall consist of forty members elected from among the active members having their principal office in the several counties, and distributed as follows: The Counties of Barnstable, Dukes and Nantucket, together, shall have one member; Berkshire County shall have one; Bristol County, three; Essex County, five; Franklin County, one; Hampden County, three; Hampshire County, one; Middlesex County, five; Norfolk County, two; Plymouth County, two; Suffolk County, twelve; and Worcester County, four.

Section 2. The President, unless he is a regularly elected member of the Council, shall be an ex-officio member thereof, with all the rights of a regular member.

Section 3. All members of the Council (other than the President) shall be elected for a term of three years, except as hereinafter provided, and shall hold their offices for that term and until their successors have been elected and qualified.

Section 4. The members of the first elected Council of The Bar of Massachusetts, other than a President who is an ex-officio member of the Council, shall so classify themselves by lot that fourteen shall hold office for one year, thirteen for two years, and thirteen for three years.

Section 5. No member of the Council who has served one full three-year term shall be eligible for re-election until after the lapse of three years.

Article 4. Nominations and Elections

Section 1. The members of the Council of The Bar of Massachusetts, in the number set forth in Section 1 of Article 3, shall be elected by the members of The Bar who are duly registered with the Secretary as active members and from the area where they have their principal office.

Section 2. Nominations for members of the Council of The Bar of Massachusetts shall be made by a nominating committee for each area, each such committee to consist of the member or members on the Council from that area, plus an equal number of active members of The Bar of Massachusetts if designated by the County Bar Association in that area and certified to the Secretary not later than June 15 in each year. For the purpose of this provision the Barnstable County Bar Association shall be taken to be the County Bar Association for the counties of Barnstable, Dukes and Nantucket, and The Bar Association of the City of Boston shall be taken to be the County Bar Association for Suffolk County. Said nominating committees shall nominate at least twice as many candidates from their respective areas as there are offices to be filled, and such nominations shall be certified to the Secretary not later than August 15 in each

year. The Secretary shall give reasonable notice of these nominations to the active members of The Bar of Massachusetts.

Section 3. Additional nominations for members of the Council of The Bar of Massachusetts may be made by petition signed either by twenty-five or by ten per cent of the persons entitled to vote in the area concerned, whichever number is less, but in no event by fewer than ten members, and such petitions shall be filed with the Secretary not later than September 15 in each year. No member shall sign more nominating petitions than there are offices to be filled from his area.

Section 4. Printed ballots for each area, which shall contain the names of all persons nominated from that area under the two preceding sections, shall be mailed by the Secretary on or within ten days prior to October 5 in each year to all persons entitled to vote in those respective areas. Voting shall be by secret ballot according to the double-envelope system, and the ballots shall be marked and returned so as to be received by the Secretary not later than October 15 in each year.

Section 5. The ballots shall forthwith be canvassed by a board of three tellers appointed by the President, the count shall be certified by the tellers to the Secretary, and the candidates receiving the highest number of votes for their respective offices shall be declared elected. In case of a tie vote the tellers shall determine the successful candidate by lot drawn by the candidates or by the tellers if authorized by a candidate.

Section 6. The term of members of the Council of The Bar of Massachusetts shall begin on November 1 following their election.

Article 5. Functions of the Council

Section 1. Subject to these By-laws, and the Rules of the Supreme Judicial Court, the Council shall administer the affairs of The Bar of Massachusetts.

Section 2. The Council, subject to the provisions of Section 1 of Article 3, shall fill vacancies in its own ranks for the period until the next regular election, and it shall provide for an election at that time, under Article 4, for the balance of the unexpired term.

Section 3. The Council may employ such assistants as it deems necessary or proper, prescribe their functions and duties, and fix and provide for the payment of their salaries or other compensation.

Section 4. Fifteen members of the Council shall constitute a quorum for the transaction of business.

Section 5. No member of the Council shall receive compensation for services rendered in connection with the performance of his duties as a member of the Council or as a member of any committee to which he may

be appointed. But the Council shall provide for the reimbursement of officers, members of the Council and members of committees for their necessary expenses incurred in connection with the performance of their duties.

Article 6. The President

Section 1. The President shall be chosen annually by the Council, either from its own membership, or outside. He shall serve until his successor is chosen and qualified. A President shall not be eligible to succeed himself following his completion of three successive one-year terms.

Section 2. The President shall preside at all meetings of The Bar of Massachusetts and of the Council, and he shall perform the duties usually belonging to his office.

Section 3. In the event of death, resignation or disability of the President, the Council may declare the position vacant and choose a new President, or it may choose a temporary presiding officer.

Article 7. The Treasurer

Section 1. The Treasurer shall be chosen by and shall serve at the pleasure of the Council. He shall not be a member of the Council. He shall receive such compensation as may be fixed by the Council.

Section 2. The Treasurer shall give bond satisfactory to the Council. He shall collect all moneys due to The Bar of Massachusetts. He shall be accountable for the funds received by him or funds entrusted to his care. He shall disburse said funds only in accordance with the By-laws and with such regulations as may be adopted by the Council. He shall report to the Secretary, on November 1, the names of members then delinquent in payment of dues, and he shall further report payments thereafter received from such delinquent members. He shall make a report as Treasurer at the annual meeting, and at such other times as the Council may request.

Article 8. The Secretary

Section 1. The Secretary shall be chosen by and shall serve at the pleasure of the Council. He shall not be a member of the Council. He shall receive such compensation as may be fixed by the Council.

Section 2. The Secretary shall act as secretary of the Council, he shall be the custodian of the records of The Bar of Massachusetts, and he shall preserve and record its transactions. He shall prepare and keep a list of all active, inactive, and honorary members of The Bar of Massachusetts; and shall, subject to the direction of the Council, send out notices of all elections and meetings. He shall prepare an annual report, and he shall

discharge all other duties usually incident to his office or appointed to him by the Rules or by these By-laws, or by vote of the Council.

Article 9. Meetings

Section 1. There shall be an annual meeting of the members of The Bar of Massachusetts, to be held at such time and place as may be set by the Council.

Section 2. Special meetings of the members of The Bar of Massachusetts shall be held whenever called by vote of the Council.

Section 3. Special meetings of the members of The Bar of Massachusetts shall also be called by the Secretary upon petition specifying the purpose of such meeting and signed by not less than eighty of its active members, in which number each of at least four areas shall be represented by at least fifteen members having their principal offices therein, and such meetings shall be held within thirty days after said petition is filed with the Secretary.

Section 4. Written notice of not less than ten days shall be given by the Secretary to all active and honorary members of any annual or special meetings of The Bar of Massachusetts, and the notice shall specify the purpose of the meeting. The Secretary shall include in such notice as a purpose of the meeting any matter requested by petition signed in the manner specified in Section 3 above.

Section 5. At any annual or special meeting of the members of The Bar of Massachusetts the right to vote shall be limited to active members, and fifty active members shall constitute a quorum.

Section 6. Recommendation to the court for amendment of the Rules for Organization of The Bar of Massachusetts, according to a proposal previously approved by the Council, may be adopted at any regular or special meeting of The Bar called for that purpose. A proposed recommendation to the court for amendment of the Rules may also be submitted in writing at any regular or special meeting of The Bar, but, unless the proposal has previously been approved by the Council, and notice thereof has appeared in the call for the meeting, no final action thereon can be taken until at another meeting called for that purpose.

Article 10. Referenda

Section 1. The Council may at any time by a majority vote of its membership, and shall, if directed by vote at a meeting of the members of The Bar of Massachusetts the call for which included notice of such a proposal, take a referendum upon any matter affecting the administration of justice or the policy of the Bar of Massachusetts. The referendum may

active members, as the Council shall determine or The Bar shall direct.

Section 2. The Council of The Bar of Massachusetts, or any committee thereof, in expressing any judgment or opinion, shall specifically state that such judgment or opinion is that of the Council, or of the committee, rather than of The Bar as a whole, except where a referendum has been taken of members of The Bar, or where there has been an expression of opinion or judgment at a meeting of the members of The Bar upon a matter stated in the notice of such meeting.

Article 11. Disbursement of Funds

Section 1. No funds of The Bar of Massachusetts shall be disbursed except upon a vote of the Council directing such payment, or upon a warrant therefor signed by the President, or by an officer for whom or the Chairman of the Committee for which the expenditure was made, or by the Chairman or two members of the Committee on Budget and Finance.

Section 2. The disbursement of funds of The Bar of Massachusetts shall be made by check signed by the Treasurer, or, in the absence or disability of the Treasurer, by the President and the Chairman of the Committee on Budget and Finance.

Section 3. The cost of the premium on the bond furnished by the Treasurer or by any other officer or employee of The Bar shall be paid from the funds of The Bar.

Article 12. Executive Committee

Section 1. There shall be an Executive Committee of the Council of The Bar of Massachusetts, consisting of nine members thereof, one of whom shall be the President, ex officio, who shall be the chairman. The members of the Executive Committee shall be appointed by the President, subject to approval by the Council.

Section 2. The Executive Committee shall have power to carry on all the affairs of The Bar of Massachusetts between the meetings of the Council of The Bar, and it shall also perform such other duties as may be imposed upon it by vote of the Council.

Article 13. Standing Committees

The President, subject to the approval of the Council, is authorized to appoint the following Standing Committees of The Bar of Massachusetts:

Section 1. *Committee on the Administration of Justice.* The Committee on the Administration of Justice is charged with considering the efficiency of the judicial system, with recommending changes in the courts

and in the work done by the courts, and with studying proposed or needed changes in procedure. The Committee is also charged with the duty of attention to all proposed changes in the laws relating to the judicial system in Massachusetts, and it may recommend to the Legislature or to a committee of the Legislature the passage, amendment or defeat of such proposed legislation. The Committee shall have such authority as the Council may confer upon it to petition for legislation or to suggest new rules in its field.

Section 2. *Committee on Admission to the Bar.* The Committee on Admission to the Bar shall co-operate with the bar examiners for the assistance of the court. This Committee is also charged with the duty of considering and suggesting changes in methods of legal education, and in the standards or requirements or procedure for admission to the bar. The Committee is also charged with the duty of attention to all proposed changes in the rules or the laws relating to admission to the bar, and it may recommend to the court or to the Legislature or to a committee of the Legislature the passage, amendment or defeat of such proposed rules or legislation. The Committee shall also have such authority as the Council may confer upon it to petition for rules or legislation in its field.

Section 3. *Committee on Amendment of the Law.* The Committee on Amendment of the Law is charged with the duty of attention to all proposed or needed changes in laws which may be of interest to the members of The Bar of Massachusetts, and it may recommend to the Legislature or to a Committee of the Legislature the passage, amendment or defeat of such proposed legislation. The Committee shall also have such authority as the Council may confer upon it to petition for legislation.

The Committee on Amendment of the Law may appoint subcommittees to consider and to attend to legislation in special fields of the law.

The Committee on Amendment of the Law shall co-operate with the Committees on Administration of Justice, Admission to the Bar, Criminal Law, and Unauthorized Practice of the Law, and also with the other committees of The Bar of Massachusetts in all legislative matters within the fields of activities of said committees.

Section 4. *Committee on Budget and Finance.* The Committee on Budget and Finance is charged with the duty of preparing and presenting to the Council the annual budget covering the expected income and the recommended expenditures of The Bar of Massachusetts. The Committee shall annually cause to be audited, by a competent public accountant, the accounts of the Treasurer, and shall transmit the report of such audit, with such recommendations as it deems to be necessary or desirable, to the Council. The expense of the audit shall be paid by The Bar.

Section 5. *Committee on Continuing Education of the Bar.* The Committee on Continuing Education of the Bar is charged with the duty to provide opportunities to the members of The Bar of Massachusetts to continue their legal education, and to this end the Committee may arrange for lectures, law institutes, study groups, special publications, and other means whereby lawyers may be encouraged and shall find opportunity to undertake further useful learning.

Section 6. *Committee on Co-operation.* The Committee on Co-operation is charged with the duty to act as a liaison or co-operating agency for lawyers or between lawyers in connection with such matters as placement service, experienced advisers' service, office rentals, and all other matters in which its services might be of benefit to the members of The Bar of Massachusetts.

Section 7. *Committee on Criminal Law.* The Committee on Criminal Law is charged with the duty to observe the administration of criminal justice in the Commonwealth, to suggest such amendments of the law and procedure as may seem advisable, to take cognizance of amendments proposed by others, and it may recommend to the Legislature or to a committee of the Legislature the passage, amendment or defeat of such proposed legislation. The Committee shall have such authority as the Council may confer upon it to petition for legislation in its field.

Section 8. *Committee on Grievances.* The Committee on Grievances is charged with the duty to perform the usual functions of a grievance committee, in such manner as the Council may prescribe. The Committee may incur expenses, subject to appropriation or approval by the Council.

Section 9. *Committee on Quarters.* The Committee on Quarters is charged with the duty to oversee the physical property and equipment owned or used by The Bar of Massachusetts, including the duty to provide books, magazines, etc., to make all needful regulations for the use of the library and quarters, and to appoint and remove all employees needed in connection therewith and to fix their compensation, subject to appropriation or approval by the Council.

Section 10. *Committee on Judicial Appointments.* The Committee on Judicial Appointments is charged with the duty to further in all proper ways the appointment of suitable and properly qualified persons to judicial office, and to prevent the appointment of unfit persons, to the end that the office of judge may remain one of dignity and respect, and that lawyers of high character, sound learning, wide experience, and judicial temperament may be placed upon the bench.

Section 11. *Committee on the Junior Bar.* The Committee on the Junior Bar is charged with the duty to organize the members of The Bar of

Massachusetts under the age of thirty-six years for the purpose of increasing their participation in professional and bar association activities, and of increasing their mutual co-operation and usefulness to each other. The Committee shall also carry out such other appropriate assignments as may be delegated to it by the President or Council.

Section 12. *Committee on Bar Associations and Societies.* The Committee on Bar Associations and Societies is charged with the duty to maintain constant interchange of opinion and unity of effort between The Bar of Massachusetts and all bar associations and societies in the Commonwealth in promoting reform in the law, facilitating the administration of justice, and elevating the standards of the profession, and in all respects to co-operate with the bar associations and societies in such manner as is consistent with the autonomy of such organizations.

Section 13. *Committee on the Massachusetts Bar Journal.* The Committee on the Massachusetts Bar Journal is charged with the duty of arranging for the publication of a journal of the bar, to be issued not less than four times a year to the active and honorary members of The Bar of Massachusetts, without charge. The Committee shall consider and shall recommend to the Council the employment of a lawyer or lawyers to perform the editorial, publishing, and advertising services which may be necessary.

This Committee shall also perform such other services as may be delegated to it by the Council in connection with special publications of The Bar of Massachusetts.

Section 14. *Committee on Meetings.* The Committee on Meetings is charged with the duty to arrange for luncheons, dinners, and other gatherings of the members of The Bar of Massachusetts, for the purpose of bringing to the members lecturers of note and in order to promote the social intercourse among the members of the bar. The Committee shall also perform such other duties in its field as may be delegated to it by the Council.

Section 15. *Committee on Publicity and Public Relations.* The Committee on Publicity and Public Relations is charged with the duty to promote a better understanding between lawyers and the general public, to furnish information to the press and to the public with regard to legal matters of current interest, and in general to use appropriate means to correct such misapprehensions and misstatements relative to these matters as are or may become current.

Section 16. *Committee on Unauthorized Practice of the Law.* The Committee on Unauthorized Practice of the Law is charged with the duty to keep itself and The Bar of Massachusetts informed with respect to the

unlawful or unauthorized practice of law by lay persons or agencies and the participation of attorneys therein, and of encroachments on the legal profession in the Commonwealth. The Committee shall concern itself with methods for the prevention of all unlawful or unauthorized practice of the law, and it shall report to the Council such instances or encroachments which in its opinion call for restraint by court action.

The Committee is also charged with the duty of attention to all proposed or needed changes of the laws relating to unlawful practice of the law, and it may recommend to the Legislature or to a committee of the Legislature the passage, amendment or defeat of such proposed legislation. The Committee shall also keep in touch with what is being done in other jurisdictions relative to unlawful practice of the law, and it may formulate proposals for new rules of court or new legislation thereon and report the same with its recommendations to the Council. It shall have such authority as the Council may confer upon it to petition for rules or legislation in its field.

Article 14. General Provisions relating to Committees

Section 1. Other committees, standing or special, in addition to the committees authorized by Article 13 of these By-laws, may from time to time be created or abolished by the Council.

Section 2. The President, subject to approval by the Council, shall appoint the members of all committees and shall designate the chairmen thereof.

Section 3. The President shall fill vacancies on any committee, subject to approval by the Council.

Section 4. The number of members of the various committees, and the distribution of such members among the several areas of the Commonwealth, shall be fixed and may be changed from time to time by the Council.

Section 5. The chairman or at least one of the members of every committee shall be selected from the members of the Council, unless the Council shall otherwise provide.

Section 6. The President shall, ex officio, be a member of all Standing Committees.

Section 7. The Treasurer shall, ex officio, be a member of the Committee on Budget and Finance, and the Committee on Quarters.

Section 8. Members of committees shall serve until their respective successors are appointed and approved.

Section 9. Unless otherwise specified by these By-laws or by vote of

the Council, a majority of the members of any committee shall constitute a quorum for the transaction of business.

Section 10. Each committee shall keep a record of its meetings and actions, and shall make an annual report to the Council.

Section 11. Each committee of The Bar of Massachusetts shall maintain close association with the officers and corresponding committees of all bar associations and societies in the Commonwealth, and of the American Bar Association.

Article 15. Amendments

Section 1. These By-laws may be amended at any annual or special meeting of the members of The Bar of Massachusetts, provided the proposed amendment is set forth in the notice of the meeting.

Section 2. These By-laws may also be amended at a meeting of the Council by affirmative vote of at least two-thirds of all the members of the Council in office, provided the amendment is set forth in a written notice of the meeting. Notice of such an amendment of the By-laws by the Council shall be published as soon as possible in the Massachusetts Bar Journal, and the amendment shall continue in force and effect unless it is disapproved at the next meeting of the members of The Bar of Massachusetts at which such action could be taken.

FULL TEXT OF THE NEW DECLARATORY PROCEDURE ACT

(St. 1945 C. 582 in effect November 1, 1945)

BRIEF HISTORICAL INTRODUCTION

Declaratory Procedure started "on the wrong foot" in Massachusetts with the result that, while the bar of many other jurisdictions have been practising and serving their clients under it for years, the Massachusetts bench and bar, generally, have lost this opportunity for the past twenty-five years because they knew little about its nature and history and did not appreciate its possibilities for clients. Even the Supreme Judicial Court has considered it as a jurisdictional matter as distinguished from a development of pure procedure. The procedure is some three hundred years old in Scotland. Lord Brougham urged its adoption in England as early as 1828. The English Procedure Act of 1852 specifically provided for it but it was not until 1883 that the English Order XXV Rule 5 was adopted, after the Judicature Acts, and, even then, the rule was challenged as involving "jurisdiction" as late as 1915 when the Court of Appeal, in the leading case of *Guaranty Tr. Co. v. Hannay* (1915, 2 K.B. 536), decided that it did not. In that case Pickford L. J. (later Master of the Rolls with the title of Lord Sterndale, a strong judge on matters of practice) said:

"Admittedly if a declaration as to liability on these bills of exchange were asked for—the purpose of getting consequential relief it could be made and all that the rule does is to remove the restriction imposed upon the making of it by the practice of the court."

Banks L. J. said:

"I cannot doubt that had the Court of Chancery in those days (before 1852) thought it expedient to make merely declaratory judgments they would have claimed and exercised the right to do so."

He also quoted Fletcher Moulton L. J. as saying:

"that an action thus framed (that is asking for a declaration of right) is the most convenient method of enabling the subject to test the justifiability of proceedings on the part of permanent officials purporting to act under statutory provisions." (See *M. L. Q. May*, 1928, 50-57).

Curiously enough, however, in the same year (1915) in which the *Hannay* case was decided, Mr. Justice Loring, in *Hanson v. Griswold* (221 Mass. 228) relying on a case decided in 1862 before old shackles were removed from Massachusetts equity by the act

of 1877 (now G. L. c. 214 s. 1) made the unguarded remark that:

"Where all that is sought by a plaintiff is a declaratory decree not the subject of relief to be based upon it, there is no jurisdiction in equity and the bill must be dismissed."

In 1920 the Judicature Commission recommended an act (M. L. Q. Jan. 1921, 113-115). When the Judicial Council was created, Mr. Justice Loring, himself, then Chairman, joined in renewing this recommendation (M. L. Q. Nov. 1925, 33-36). In 1929 an act was adopted but limited to the interpretation of written instruments. Even then, in one of the earliest cases under the act, *Whiteside v. Merchants Natl. Bank*, 284 Mass. at 284 (1933), Chief Justice Rugg, while sustaining the act, repeated Judge Loring's suggestion as follows:

"It is assumed that apart from the statute and rule the case at bar would not fall within any recognized head of equity jurisprudence, and the court would decline to decide it," citing *Hanson v. Griswold*, 221 Mass. 228. *Hill v. Moors*, 224 Mass. 163.

Why it was thus "assumed" is not stated.

With this somewhat curious history in the background, the new act of 1945 removes the earlier restrictions in all the courts, except the district courts, and brings Massachusetts in line with the convenient modern revival of this established practice of other jurisdictions, with the Federal Act and the "Uniform" Act and a multitude of precedents both in England and America behind it. The act was recommended by the Judicial Council in its 20th report, pp. 15-19 (reprinted in Mass. Law Quart. for Dec. 1944) where convenient references will be found. There are also two text books on the subject—Borchard "Declaratory Judgments" 2nd ed. 1941, and Anderson.

In Vol. 16 Bar Bulletin, No. 9 for October 1945, p. 218, Mr. Newhall suggests that "the weak spot in the statute is the word "controversy" and that "the prior statute had no such requirement." The act of 1929 followed the English Order XXV Rule 5. A "controversy," as distinguished from a mere "moot question, was implicit in their practice and the reason it is used in American statutes is to avoid the idea which misled the Michigan court years ago in the *Anway* case, since overruled. The history and meaning of the use of the word will be found in Borchard's book. It should also be noticed that this is an *alternative* procedure regardless of the existence of any other procedure. This also is explained in Borchard.

F. W. G.

[CHAP. 582]

AN ACT EXTENDING PROCEDURE FOR DECLARATORY JUDGMENTS.

SECTION 1. The General Laws are hereby amended by inserting after chapter two hundred and thirty-one the following chapter:—

CHAPTER 231A.

PROCEDURE FOR DECLARATORY JUDGMENTS.

Section 1. The supreme judicial court, the superior court, the land court and the probate courts, within their respective jurisdictions, may on appropriate proceedings make binding declarations of right, duty, status and other legal relations sought thereby, either before or after a breach or violation thereof has occurred in any case in which an actual controversy has arisen and is specifically set forth in the pleadings and whether any consequential judgment or relief is or could be claimed at law or in equity or not; and such proceedings shall not be open to objection on the ground that a merely declaratory judgment or decree is sought thereby and such declaration, when made, shall have the force and effect of a final judgment or decree and be reviewable as such; provided, that nothing contained herein shall be construed to authorize the change, extension or alteration of the law regulating the method of obtaining service on, or jurisdiction over, parties or affect their right to trial by jury. When a declaration of right, or the granting of further relief based thereon, shall involve the determination of issues of fact triable by a jury as of right and as to which a jury trial is duly claimed by the party entitled thereto, or issues which the court, in accordance with the practice of courts of equity, considers should be tried by a jury, such issues may be submitted to a jury in the form of questions, with proper instructions by the court, whether a general verdict be required or not.

Section 2. The procedure under section one may be used to secure determinations of right, duty, status or other legal relations under deeds, wills or written contracts or other writings constituting a contract or contracts or under the common law, or a charter, statute, municipal ordinance or by-law, or administrative regulation, including determination of any question of construction or validity thereof which may be involved in such determination.

The foregoing enumeration shall not limit or restrict the exercise of the general powers conferred in section one in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty.

Section 3. The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceedings or for other sufficient reasons. The reasons for such refusal shall be stated in the record.

Section 4. All orders, judgments, decrees and refusals under this chapter may be reviewed as other orders, judgments and decrees.

Section 5. Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If

the application be deemed sufficient the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree to show cause why further relief should not be granted forthwith.

Section 6. In an action at law or suit in equity heretofore or hereafter brought to obtain a judgment or other consequential relief, whether such judgment or relief is granted or not, the court may make a binding determination as provided in this chapter upon application of any party made in his declaration, bill, petition or answer.

Section 7. Where a judgment or other consequential relief is sought in an action or suit, the costs shall not be affected by the making or refusal of any determination; but in a suit for a determination only, under this chapter, costs shall be as in other cases in equity.

Section 8. When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or by-law or of a franchise, license, easement or other privilege granted by the commonwealth or a municipality thereof, the municipality, or the agency granting the privilege, as the case may be, shall be made a party and shall be entitled to be heard. If a question of constitutionality is involved in any proceeding under this chapter, the attorney general shall also be notified of the proceeding and be entitled to be heard.

Section 9. This chapter is declared to be remedial. Its purpose is to remove, and to afford relief from, uncertainty and insecurity with respect to rights, duties, status and other legal relations, and it is to be liberally construed and administered. Nothing in this chapter shall be held to affect the jurisdiction of the land court, and the procedure established hereby shall be in addition to any other procedure for declaratory relief.

SECTION 2. Section three of chapter two hundred and thirteen of the General Laws, as amended, is hereby further amended by striking out clause Tenth A, as appearing in the Tercentenary Edition, and inserting in place thereof the following clause:—

Tenth A, Making effective the declaratory procedure provided by chapter two hundred and thirty-one A.

SECTION 3. Section six B of chapter two hundred and fifteen of the General Laws, inserted by section one of chapter two hundred and forty-seven of the acts of nineteen hundred and thirty-five, is hereby repealed, but notwithstanding said repeal the provisions thereof shall continue to apply as to proceedings commenced prior to November first, nineteen hundred and forty-five.

SECTION 4. All rules of courts pertaining to the procedure referred to in clause Tenth A of section three of chapter two hundred and thirteen of the General Laws, as existing immediately prior to November first, nineteen hundred and forty-five, shall continue to apply until annulled or superseded.

SECTION 5. This act shall take effect on November first in the current year.

Approved July 10, 1945.

THE BILLS PENDING BEFORE CONGRESS TO REPEAL
THE FEDERAL COURTS' JURISDICTION IN CASES OF
DIVERSITY OF CITIZENSHIP —

*A Discussion of the Bills for Submission to the
House Committee on the Judiciary*

The editor was called upon recently to state his views on these bills as a member of the standing Committee on Jurisprudence and Law Reform of the American Bar Association, and also as one of the Massachusetts Directors of the American Judicature Society, whose views were requested for submission to the Committee on the Judiciary of the House of Representatives.

The bill was supported before the Committee on Judiciary of the Senate by Judge Denman of the Circuit Court of Appeals of the Ninth Circuit on behalf of twenty-four judges in that circuit. The pending bills (which are identical) are numbered H. R. 1468 and S. 466. The argument of Judge Denman before the Senate Judiciary Committee on October 8, 1945, was printed for the use of the Judiciary Committee. A copy of this argument, together with a copy of the bill, may be seen at the Headquarters of the Massachusetts Bar Association, Room 622, 53 State Street, Boston.

As these bills, if passed, *would affect the practice of every lawyer in Massachusetts so far as the jurisdiction of the federal courts is concerned*, the following statement is printed for their information so that they may understand the issue, form their own opinion, and communicate their views to the Senate and House Committee on the Judiciary, and to their representatives in Congress, if they wish to do so.

Statement in Opposition to Senate 466 and House 1468 to Repeal the Jurisdiction of the Federal Courts based on Diversity of Citizenship.

I oppose the bills before Congress to repeal the jurisdiction of the Federal Courts based on diversity of citizenship for the following reasons.

I have read the argument by Judge Denman on behalf of the judges of the Ninth Circuit before the Senate Committee on the Judiciary. I have also read the report of the American Bar Association Committee for 1932, and the debate on that report (See 57 A. B. A. Reports, p. 506 and pp. 113-116). I have also read the scholarly, if somewhat caustic, article by Professor McGovney in 56 Harvard Law Review.

I gather from reading that some constitutional question

has been argued from time to time as to the authority of Congress to pass this act. It seems to me that Professor McGovney has demonstrated that there is no constitutional question worth talking about and that this matter of the jurisdiction of federal courts is a question of policy.

On the question of policy, I oppose, and recommend opposition to, the total repeal of the clause giving jurisdiction to the federal courts on the ground of diversity of citizenship as proposed in the bills now pending, but I am inclined to support the substance of the bill introduced by former Attorney General Mitchell in 1932. That bill, as I understand it, proposed to leave the clause alone so far as individuals are concerned who were non-residents of a state but provided that corporations of another state doing business within a state should be considered as citizens of the state in which they do business for the purposes of jurisdiction of matters arising out of or connected with that business, thus putting them within the jurisdiction of the state courts. In reaching this conclusion, I appreciate the force of much of Judge Denman's argument as to current conditions which differ of course to some extent from those of a century or more ago. I do not think, however, that they differ quite so much as Professor McGovney and others seem to think. Human nature is the same today and I am not impressed with the suggestion that local prejudice against outsiders for a variety of possible reasons may not show itself from time to time, however civilized we may be or become. I do not think anyone can say that individual outsiders or corporations from other states may not need the protection contemplated by the federal jurisdiction, either today or in the future in connection with some cases, and in saying this I have the older as well as the younger states in mind. I think I know of one case now in an old state. I am specially impressed with this in view of one argument used by Judge Denman which in my opinion does not support the bill, but distinctly weakens the support. He refers to the fact that in a considerable number of the states verdicts in civil cases by less than the whole jury are allowed. I think I am safe in saying that in the judgment of the experienced members of the Massachusetts Bench and Bar majority verdicts reduce the value of the most impartial and strongest characters on the jury in favor of the possible prejudices of the other jurymen. I do not think that non-residents who are likely to be subjected to the prejudices of a majority verdict,

which seems more likely to be prejudiced than the judgment of a court, should be deprived of the protection of the federal jurisdiction. In my opinion, the requirement of unanimity is far more important than the number of a jury.

I am not impressed with the reference to the fact that it is a "fiction" to call a corporation a "citizen." Professor McGovney develops this idea in caustic language as an objection to the present jurisdiction of the federal court. I think there is a good deal of loose talk about fictions which have contributed, and still do contribute, to sound government in some respects. Without the fictions relied on by the courts in the development of quasi-contracts or in the earlier action of ejectment as developed by Lord Mansfield, English and American justice would be far behind what they are today. Probably the biggest fiction of all (and one which appears to be carried somewhat to excess by some members of the Supreme Court of the United States at times) is involved in the American Doctrine of Constitutional Law. The "presumption" of the validity of legislative acts was said by the late James B. Thayer to be based on the assumption "that virtue, sense and competent knowledge, are to be attributed to—the legislature, as the majestic representative of the people." (See Thayer's "Legal Essays") These are large words stating a reasonable theory necessary as a reasonable basis for our system of constitutional law although capable of being overworked, but I do not believe that any member of the American Bar will say that those words do not involve at least occasionally a pretty big fiction.

Granting that the treatment of corporations in the matter of jurisdiction was based on a fiction when it was established about a century or more ago, it may, nevertheless, have been on the whole a just fiction and its persistence may have resulted from a common recognition of this fact, however powerfully it may be ridiculed. It is not uncommon for a majority opinion to be right about some things in its day and generation, even though it is feebly expressed as compared with some powerful dissent. [See Gray "Nature and Sources of Law" p. 257].

The real question is whether the fiction on the whole produces more justice than would be produced if it was entirely abolished.

I am not convinced that it should be entirely abolished as regards corporations not doing business within a state or as to business or facts not occurring within the state.

I am not impressed with the suggestion of Judge Denman that a "local attorney knows nothing of federal law." He is suppose to know something about it, and even if he does not, I assume that local attorneys are as shrewd in the use of the local law which they do know as any federal or corporation attorney is in the use of his materials. Every experienced lawyer knows that local attorneys are sometimes chosen because of the "local atmosphere" which their mere presence in the courtroom may create. I assume that there are many members of the bar in all the states who, in arguing before a jury, or even before a court, may sometimes appeal directly or indirectly to every possible local prejudice which they think exists. We are all familiar with Sergeant Busfuz at the trial of the case of *Bardell v. Pickwick* in Charles Dickens's novel. I do not believe that Busfuz has entirely disappeared from any American state bar, or even from the Ninth Circuit. I have certainly heard him occasionally in Massachusetts.

The federal jurisdiction rests on very practical human considerations, and, while it may, perhaps, well be modified somewhat, it should not be entirely abolished.

For these reasons, while I am inclined to support the plan suggested by former Attorney General Mitchell in 1932, I oppose the bills now before Congress.

FRANK W. GRINNELL

FORFEITURE AND DISQUALIFICATION FOR PUBLIC OFFICE

*Extracts from former Attorney General Bushnell's
Report P. D. 12—Discussion*

As copies of this report were scarce we reprinted extracts from it in the "Quarterly" for May 1945 (pp. 22-49).

As the following portion is brief, presents a curious state of affairs and suggests a remedy, it also is reprinted and discussed.

Extracts from the Report

"For more than two years of this war, the industrial city of Lawrence, engaged in the production of quantities of badly needed war materials, was successively governed by public safety commissioners confined in the county jail. This was at a time when it was not at all improbable that enemy action could make the efficient use of the public services involving safety very necessary indeed to the people of Lawrence.

"An amazing application for pardon was referred to the Attorney General in August of 1942. A pardon for the incarcerated public safety commissioner was sought on the ground that as head of the public safety services of the city of Lawrence the commissioner could better perform his duties in regard thereto outside of jail than in, and the granting of his pardon would, therefore, be in aid of the war effort!

"In my opinion legislation to correct such situations is urgently needed and a suggested draft is subsequently set forth in this report. No official guilty of conspiracy to betray the public in one office should be permitted to hold that office or any other. While technically a misdemeanor, a conspiracy may involve greater moral turpitude than a single act for which greater penalties are provided. It seems hardly necessary for the Attorney General to suggest that 'proper administration of the law' cannot be expected from the Public Safety Department of a large city whose recognized executive though confined to a county jail, is still conducting the business of the Department."

Later in the report he recommends legislation to provide for "forfeiture of public office in certain cases of conspiracy." He quotes Gen. Laws (Ter. Ed.), Chap. 268, s. 8 which provides as follows:

"Acceptance of Bribe by Officer; Forfeiture of Office, etc. upon Conviction for Larceny, etc.—A legislative, executive, judicial, county or municipal officer who corruptly requests or accepts a gift or gratuity or a promise to make a gift or to do an act beneficial to him, under an agreement or with an understanding that his vote, opinion or judgment shall be given in any particular manner, or upon a particular side of any question, cause or proceeding, which is or may be by law brought before him in his official capacity or as a consideration for any speech, work or service in connection therewith, or that, in such capacity, he shall make any particular nomination or appointment, *shall forfeit his office, be forever disqualified to hold any public office, trust or appointment under the constitution or laws of the commonwealth*, and be punished by imprisonment in the state prison for not more than ten years or by a fine of not more than five thousand dollars and imprisonment in jail for not more than two years; and an executive, county other than judicial, or municipal officer who is finally convicted or committing, in connection with the performance of the duties of such office, the crime of larceny,

embezzlement or obtaining money under false pretences shall, in addition to the penalty imposed by law for the punishment of such crime, forfeit his office and be forever disqualified to hold any public office, trust or appointment as aforesaid." (Italics are inserted by Editor.)

Mr. Bushnell then says:

"This statute, in accordance with sound public policy, protects the public against officials continuing to hold the office or duties with which they have been entrusted, after having been convicted of betraying that trust in the manner described.

"The proposed amendment, in accordance with the same public policy, is intended to protect the public against officials continuing to hold public office after they have demonstrated the same disregard for the public trust involved by *conspiring* to do the same things.

"Often, though not always, the *conspiracy* is proved by evidence showing that the official has actually committed a succession of the acts for which forfeiture is provided under present law. (See *Commonwealth v. Galvin*, et al., 310 Mass. 733.) It is submitted that what the public should be protected against is the official's state of mind toward the public trust, which is evidenced quite as much by a *conspiracy* to betray the public as by a *single act* of betrayal for which forfeiture is now imposed."

He then suggests amending Section 8, by adding the following:

"and a legislative, executive, judicial, county or municipal officer *who is finally convicted of conspiring* with another person or with other persons to commit any of the offences herein above set forth shall forfeit his office and be forever disqualified to hold any public office, trust or appointment as aforesaid, in addition to penalties otherwise imposed by law for the said crime of conspiracy."

DISCUSSION

The question arises whether Mr. Bushnell is right in suggesting that "conviction" of the offenses described in the first thirteen or fourteen lines of section 8 of ch. 268 through the word "commonwealth" is necessary for forfeiture and permanent disqualification for public office. It is noticeable and seems to be as clear as the English language can make it that this first part of the

statute is not a criminal penalty but is purely for the protection of the public service and for that purpose provides for forfeiture and disqualification directly on, and because of, the facts, regardless of criminal conviction. Criminal punishment is a separate matter and is a *subsequent and separable provision* beginning with the words "and be punished." It differs in this respect from the offenses listed in the later part of the act where *conviction* and punishment come first and then "in addition to the penalty —for the punishment," forfeiture and disqualification follow. In this respect the opening part resembles the provision in chapter 1 sec. 2 article 8 of the Constitution providing that in cases of impeachment (which is for the purpose of protecting the public service by exclusion of the unfit) the judgment of the Senate "shall not extend further than to removal from office and disqualification" but the party impeached shall also be "liable to indictment, trial, judgment and *punishment* according to the laws of the land."

If this view of the statute is correct, then the facts resulting in forfeiture and disqualification, whether in a state or municipal office, would seem to be open in a civil proceeding to try the title to the office, either by mandamus or at common law by information in the nature of *quo warranto* in the discretion of the attorney general as part of his common law functions (See references as to such information following G. L. ch. 249 sec. 6 in the annotated laws). A direct proceeding to try the title to office brought by a claimant by petition for mandamus is allowed under our Massachusetts practice but no collateral is allowed.

The question never appears to have been raised thus far, but the statute, in its present form, dates back to the Revised Statutes of 1836 where it was introduced by the commissioners who prepared that revision. The members of that commission, under the chairmanship of Honorable Charles Jackson, were particularly able lawyers who knew how to use the English language.

We may be mistaken, but, if the view of the statute above stated is correct, then, regardless of any conviction of "conspiracy," or, even in case of a conviction for conspiracy, as in the case cited by Mr. Bushnell in 310 Mass., no amendment of the statute is needed to enable the attorney general to proceed to establish a forfeiture and disqualification by an information in the nature of *quo warranto* in the city of Lawrence or any other municipality which might be faced with facts similar to those

described by Mr. Bushnell in connection with the Lawrence case (see *Atty. Gen. v. Sullivan*, 163 Mass. 46, 100 p. A. G. 633 and citations under G. L. c. 249). The language of 1836 and its arrangement were retained in 1891 c. 349 when the scope was extended to "county and municipal" officers and again retained in 1923, chapter 451, when the additional offenses were added with a change requiring prior conviction as to them *but not otherwise*.

If, as stated by Mr. Bushnell, a conspiracy is proved by evidence showing that an official has committed acts for which forfeiture is provided by the first part of section 8 we find it difficult to believe that the commissioners and the legislature of 1836, and in 1891 and 1923, intended by that language that a municipal official who committed such acts should continue in office while incarcerated and continue to be qualified for office simply because he acted with somebody else and was charged with "conspiracy" instead of something else on the same facts which would disqualify him if established in the proceeding to try the title to the office above suggested. In case of an elective office it would seem, also, that the name of a "disqualified" person could be kept off a ballot or nomination papers by mandamus against the election officers.

If the legislation proposed by Mr. Bushnell is to be considered, perhaps this view of the present statute should be considered also. Conceivably an advisory opinion of the justices might be obtained before any legislation is passed on the "important question of law" whether the issues under the first part of section 8 can be raised in proceedings such as those suggested without any previous criminal conviction.

F. W. G.

A STUDY OF THE CONTRIBUTION TO THE MASSACHUSETTS CONSTITUTION IN 1779 OF A FORGOTTEN PATRIOT AND JUDGE—JEDEDIAH FOSTER OF BROOKFIELD IN WORCESTER COUNTY¹

The following paper was read before the Massachusetts Historical Society in 1942, the year of the 250th anniversary of the Supreme Judicial Court (formerly known as the Superior Court of Judicature). In view of the current weakening, or perhaps, evaporating, tendencies in American constitutional law, partly as a result of forgetting, or misunderstanding, the story of early constitutional thinking in Virginia and New England, before, as well as during, the Revolutionary period,² the paper is reprinted (by permission) as a reminder of the lasting services and influence of a member of our court, whose work, like that of some of our other public-spirited men, has, by the accidents of history, been too long forgotten. The late Mellen Chamberlain said of John Adams, "It matters little to the stout old patriot with what measure of fame he descends to a remote age, for he will never wholly die, but to us and to those who come after us it is of more than

¹ The main biographical facts about Jedediah Foster have been taken from Joseph I. Foot, *An Historical Discourse Delivered at West Brookfield, Mass., Nov. 27, 1828* (West Brookfield, 1843).

² See "John Winthrop and the Constitutional Thinking of John Adams," 63 Mass. Hist. Soc. Proc.

passing consequence that we and they withhold no tribute of just praise from those—who deserve the respectful remembrance of their countrymen—and whose services ought never to be forgotten as long as free, united, constitutional government holds its just place in the estimation of the people." (See "John Adams and other Essays.")

Mr. Chamberlain continued "There is a tendency to overestimation when our eyes are fixed somewhat exclusively upon a single actor in a cause which enlists the abilities of other eminent men." While John Adams was the central figure in the drafting of our Constitution, if we could find and marshal all the facts, Parsons, James Sullivan, Foster, and, perhaps, others of "the committee of thirty," would probably appear as contributing more than is generally realized to the final result. We need a balanced view of history and of historical figures. This paper is an attempt to present one. There appear to be no Foster papers available for reference.

THE STUDY OF JEDEDIAH FOSTER

Jedediah Foster, "ever pre-eminent in the annals of Brookfield," came from "that home of good men, the town of Andover,"³ where he was born on October 10, 1726. Shortly after graduation from Harvard College in 1744 he settled in Brookfield. "No man," declared the Reverend Lyman Whiting in his oration on the occasion of the Brookfield bicentennial in 1860, "has ever dwelt among us who held so many local trusts—lived in such intimate sympathy with the people, cared for and served them so abundantly and excellently,—and yet so far excelled them in station and character. He projected and carried through more that is to be prized in our town life, than could be recounted for hours."⁴ In 1754 he was appointed a Justice of the Peace for Worcester County. In 1761 he was chosen by the town of Brookfield as its representative in the General Court and he was annually re-elected until 1775. In the latter year he was appointed Judge of Probate for Worcester County. In 1774 he was elected a member of the Council, but his election was vetoed by Governor Gage because Foster had been "one of the memorable ninety-two . . . who refused to rescind the vote for the circular letter" and had "opposed the measures of Bernard and Hutchinson for abridging the Liberties of the country."⁵ In 1776 he was appointed a Justice of the Superior Court of Judicature and he served until his death on October 17, 1779, at the age of fifty-three. Elected a member of the Massachusetts constitutional convention in 1779, he was chosen to the committee of thirty that was charged with preparing a declaration of rights and a frame of government, and he served actively from the meeting of the convention in September until his death the following month.

At this point an interesting historical question arises. According to Roger Foster:

"The town tradition, handed down from generation to generation, seems to establish the fact that although valuable assistance may have been given by John Adams, the draft of that great State paper in the form nearest that finally ordered, was written by Judge Foster's hand in the Foster House on Foster's Hill."⁶

In connection with this passage, Mr. Foster added a footnote as follows:

"The grandson of John Adams with commendable filial piety has inserted in the former's works the first draft of that Constitution, together with the claim that it was entirely written by John Adams. There is no mention of this in the diary or autobiography of Adams, nor in any contemporaneous publication. No manuscript draft or copy by the second President has been

³ Lyman Whiting, *A Bi-centennial Oration Made in West Brookfield, July 4, 1860, at the Celebration of the Two Hundredth Anniversary of the Settlement of the Town of Brookfield* (West Brookfield, 1869), 51.

⁴ *Ibid.*, 52.

⁵ Quabaug, 1860-1910: *An Account of the Two Hundred and Fiftieth Anniversary Celebration Held at West Brookfield, Mass., September 21, 1910*, Charles J. Adams, Editor (Worcester, 1915), 81.

⁶ *Ibid.*, 101.

found. The sole authority for the statement is an unpublished letter by him to W. D. Williamson, dated February 5th, 1812, and not included in his works, nor ever published, so far as the writer can ascertain. This was written when the Ex-President was seventy-seven; when his memory as to what occurred in the Convention was impaired, as is admitted by Charles Francis Adams in another connection . . . ; and when, as is often the case at that period of life, he was not inclined to excessive modesty concerning his earlier achievements. John Adams himself complains of the inaccuracy of his memory in several instances. . . . Moreover, in a contemporaneous letter, written to Benjamin Rush November 6th, 1779, . . . John Adams expresses regret that the committee did not adopt his wishes as to the composition of the legislature. He is undoubtedly entitled to full credit for the insertion in the draft of an extraordinary clause giving to the governor the right to an absolute veto, the power which had long since become obsolete in England. (See *Defense of the Constitution of the Government of the United States of America*, Vol. I, Ch. III.)

"On the other hand, the tradition of Brookfield that the draft of the instrument was written by Jedediah Foster is corroborated by the statement in the *Boston Gazette* of November 9th, 1779: that his death was hastened by his labors upon that instrument.

"Both John Adams and Jedediah Foster were members of the Committee of Thirty selected by the Convention to draft the Constitution. There is no record of the proceedings of that committee, except the draft contained in their report, which was first published in 1832 and was afterwards reprinted as part of the Works of John Adams. Judge Foster died October 17th, 1779, eleven days before the report was presented to the Convention. John Adams sailed for Europe November 13th, 1779, two weeks after the presentation of the report, while it was still under discussion.

"It is believed that to any dispassionate mind acquainted with the writings of both, the style of the document will appear to resemble that of the older more nearly than that of the younger statesman. It is smoother than the authentic writings of John Adams."

This is the first challenge that I have noticed to the generally accepted view that the draft of the substance of the Massachusetts constitution came from John Adams.⁸ Can the challenge be met on the evidence by what Mr. Foster calls "a dispassionate mind"? I think it can, and without in the least depreciating or exaggerating the relative value of the services of either man.

When all due allowance is made for the weaknesses of John Adams (of which he was perfectly conscious in his calm moments) and for the acknowledged uncertainty of his memory for details in some of his statements written after he left the presidency, the facts appear to be as follows—and I speak from considerable familiarity gained through observation of, and participation in, the drafting of laws.

Mr. Foster says that "valuable assistance *may* have been given by John Adams." This hardly seems a fair comment; and in the footnote quoted he singles out, ironically, what he calls the "extraordinary" proposal by Adams for an absolute veto of legislation by the governor. Foster does not mention the fact, however, that Adams was open-minded enough to write to Jonathan Jackson on October 2, 1780, that the report of the committee and the finished constitution which were published "in all the public papers of Europe . . . have been treated with much respect" and that "the substitute for the Governor's negative is generally thought an amelioration, and I must confess it is so widely guarded that it has quite reconciled me."⁹

⁷ *Quabaug, 1660-1910*, 101n.

⁸ "It was the task of John Adams to construct a government on the ruins of what his cousin Samuel Adams had done so much to destroy." *A Manual for the Constitutional Convention, 1917* (2nd ed., Boston, 1917), 20.

⁹ *The Works of John Adams*, Charles Francis Adams, Editor, IX. 510-511. The italics are mine.

When one pieces together the information contained in Mr. Foster's oration and the evidence in the ten volumes of the *Works* of John Adams,¹⁰ which reflect all Adams's varying moods, his recollections, his changing opinions, and his explosions, as well as his calmer, farsighted judgment and suggestions, the evidence arranges itself as follows.

Adams was, of course, not the only constructive mind in Massachusetts; there were many of them of various kinds, and "one star differeth from another star in glory." But, with all his faults, he was the man who was turned to for suggestions in almost every Revolutionary crisis, local or national, before 1780, and he met the tests. Adams had early given special attention to the problem of state governments after independence should have been achieved, and his *Thoughts on Government* (1776), in which he presented his model, was read throughout the country.¹¹

The situation that existed when the constitutional convention met in Cambridge on September 1, 1779, is described with what seems fairness and not mere "commendable filial piety" by Charles Francis Adams in his life of his grandfather.

"The convention immediately adopted two propositions as guides to their labors. The first specified the object of their wishes, which was 'to establish a free republic.' The second defined the essence of it to be, 'the government of a people by fixed laws of their own making.' Taking this position as their point of departure, the next step was the creation of a committee of thirty-one to mature a draft of an instrument to accomplish the design. This committee, in its turn, delegated the task to a smaller one, which employed Mr. Adams. The result was a form of constitution, preceded by a bill of rights, the leading features of which were his work. This result fell in sufficiently with the views of the Essex men to secure their support, without which it would not have been adopted, whilst it recommended itself to the judgment of the Boston interest so far as to meet the approbation on the one side, of James Bowdoin, and, on the other, of Samuel Adams, both alike indispensable to its success. Here, however, the active service of John Adams, in this department, was to stop. Before the report of the large committee came up to be acted on, he had been summoned to another field of duty, which compelled him to leave his work to be matured by other hands. It is among the recommendations of its quality that it survived this transfer; and growing better by careful handling, and the suggestions of acute professional skill, as well as of sound practical experience, it soon followed him across the ocean in so satisfactory a shape, that he was able, with pride, to lay it before the distrustful as a proof that the task which his countrymen seemed to them rashly to have undertaken, was not at all beyond their ability to execute with success."¹²

After organizing in the first few days of September, the convention devoted September 6 to what is described in the *Journal* as "free conversation," which was probably very free indeed. The proposed constitution rejected in 1778 was at hand. Also available was the pamphlet which led to its defeat, the so-called Essex Result,¹³ which was full of suggestions from the pen of young Theophilus Parsons. There were also before the convention suggestions from towns in Berkshire, from Concord, and doubtless from other communities.

It appears from the remarks of Judge Thomas Dawes (a member of the convention) in the subsequent convention of 1820, that John Adams made a speech during the "free conversation" of September 6. "He had not for-

¹⁰ See particularly *Works*, I. 284; III. 229; IV. 214, 215, 219; VII. 177, 179; IX. 393, 442, 463, 465, 506, 509, 510, 618, 623.

¹¹ Adams, *Works*, IV. 188-267.

¹² Adams, *Works*, I. 288.

¹³ *Result of the Convention of Delegates Holden at Ipswich in the County of Essex, Who Were Deputed to Take into Consideration the Constitution and Form of Government, Proposed by the Convention of the State of Massachusetts-Bay* (Newburyport, 1778); reprinted in Theophilus Parsons, *Memoir of Theophilus Parsons* (Boston, 1861), 359-402.

gotten the introductory speech [of John Adams]. . . . That speech was intended to reconcile the discordant sentiments which prevailed in gentlemen from different parts of the Commonwealth and of different means of information."¹⁴ As for the twelve delegates from Boston, of whom Dawes was one, "those gentlemen were obliged to change their minds as light beamed upon them on the various subjects discussed."

A committee of thirty to prepare a draft was appointed, and on September 7 the convention adjourned on October 28. But anyone familiar with drafting documents knows that a committee of thirty cannot begin such an undertaking. A few individuals have to start putting things on paper. The committee met to begin work on September 13 and a subcommittee of three was chosen consisting of John and Samuel Adams and James Bowdoin. Naturally, the preliminary task was turned over by them to the most experienced thinker and draftsman of the three—John Adams. He prepared a draft—that was his job. Its exact form no one knows, as no copy has survived. His draft was, of course, submitted to his colleagues on the subcommittee and was in due course, at some unknown date, presumably by October 1, submitted to the full committee of thirty. It seems obvious, from the account of Roger Foster, that this is the natural and probable point at which Jedediah Foster entered the picture. He had, doubtless, been actively considering the subject since September 13.

As a justice of the Superior Court and one of the able, balanced, and informed men of judgment, coming, moreover, from the center of the state and thoroughly familiar with the sentiments of the people and with their problems, he may well have occupied a position similar to that of some member of the Committee on Style in the Philadelphia Convention of 1787. He is known to have overworked himself under pressure, as the convention was to meet again on October 28; and he died of a fever on October 17.

We may accept the Brookfield tradition that Foster prepared a draft of the constitution before his death. The only draft actually in existence is that reported by the full committee on October 28, 1779,¹⁵ and it may well be that this represents Jedediah Foster's revision of Adams's earlier draft in the matter of phraseology. The document was no one man's work. It should not be forgotten that Theophilus Parsons was a member of the committee of thirty and that he was an articulate person. There were other thinking men, too, on that committee, including three of Foster's colleagues of the Superior Court, William Cushing, James Sullivan, and David Sewall.

All this is clearly suggested by the sentence of Charles Francis Adams, already quoted, as to the draft of John Adams.

"It is among the recommendations of its quality that it survived . . . and growing better by careful handling, and the suggestions of acute professional skill, as well as of sound practical experience,¹⁶ it soon followed [Adams] . . . across the ocean in so satisfactory a shape . . . as a proof that the task which his countrymen seemed . . . rashly to have undertaken, was not at all beyond their ability to execute with success."

This is the real tribute of Charles Francis Adams to the work of Jedediah Foster and his associates, although he does not name him. We are indebted to Roger Foster for preserving in print the Brookfield tradition of one of the leading men who contributed "the careful handling . . . the suggestions of acute professional skill" and "sound practical experience" to the final draft. Jedediah Foster deserves to be remembered.

FRANK W. GRINNELL.

Note

Two of his sons were United States Senators at the same time—one for Massachusetts and one for Rhode Island. One of his grandsons, Dwight Foster, was Attorney General from 1861 to 1864 and a Justice of the Supreme Judicial Court from 1866 to 1869.

¹⁴ *Journal of Debates and Proceedings in the Convention of Delegates Chosen to Revise the Constitution of Massachusetts . . . 1820* (Boston, 1853), 480.

¹⁵ Adams, *Works*, IV, 219-267.

¹⁶ Italics mine.



